LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 28 1964
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 789

RAYMOND D. HOWELL,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio.

BERNARD A. BERKMAN,
1320 Superior Building,
Cleveland 14, Ohio,
Counsel for Petitioner.

GEORGE S. ROEST,
187½ E. Center Street,
Marion, Ohio,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—PHONE: 621-8647

TABLE OF CONTENTS.

Citations to Opinions Below 1

Jurisdiction 2

Questions Presented 2

Constitutional and Statutory Provisions Involved 3

Statement 4

Reasons For Granting the Writ 5

Conclusion 9

Appendix A:

Journal Entry of the Court of Common Pleas of Marion County, Ohio 10

Ruling on Motion for New Trial Filed April 4, 1963 12

Journal Entry of the Court of Appeals of the Third Appellate District of Ohio, Marion County 12

Order of the Supreme Court of the State of Ohio, Dismissing the Appeal 13

TABLE OF AUTHORITIES.

Cases.

Adamson v. California, 332 U. S. 46 (1947) 6, 7

Cincinnati v. Hyams, 77 Ohio App. 403 (Hamilton 1945) 6

Cleveland v. McNea, 158 Ohio St. 138 (1952) 6

Cohen v. Hurley, 366 U. S. 117 (1961) 6, 8

DeLuna v. United States, 308 F. 2d 140 (5th Cir. 1962) 6

Halsey v. State, 42 Ohio App. 291, *error dism'd* 125 Ohio St. 628 (1932) 6

Leonard v. State, 100 Ohio St. 456 (1919) ---------- 5

Long v. State, 109 Ohio St. 77 (1923) ---------- 5

Malloy v. Hogan, 378 U. S. 1 (1964) ---------- 7

Mapp v. Ohio, 367 U. S. 643 (1961) ---------- 7

Snyder v. Massachusetts, 291 U. S. 97 (1934) ---------- 6

State v. Butler, 43 Ohio Ops. 321 (Franklin App. 1949), *reh. den.* 43 Ohio Ops. 325, m.c.o. 6/21/50 6

State v. Morrow, 90 Ohio St. 202 (1914) ---------- 5

State v. Parks, 105 Ohio App. 208 (Franklin 1957) -- 6

Twining v. New Jersey, 211 U. S. 78 (1908) ---------- 6, 7

United States v. Ragland, 306 F. 2d 732 (4th Cir. 1962) ---------- 6

Constitutions.

Constitution of Ohio, Art. I, Sec. 10 ---------- 3, 5

Constitution of the United States:

Fifth Amendment ---------- 2, 3, 8

Fourteenth Amendment ---------- 2, 3, 8

Statutes.

Ohio Revised Code:

Sec. 2905.10 ---------- 1, 4

Sec. 2945.43 ---------- 3, 5

28 U. S. C. § 1257(3) ---------- 2

In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. _____

RAYMOND D. HOWELL,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI To the Supreme Court of the State of Ohio.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered in this cause on September 23, 1964, dismissing the appeal of the petitioner from a conviction under Ohio Revised Code § 2905.10.

CITATIONS TO OPINIONS BELOW.

The journal entry of the Common Pleas Court of Marion County, Ohio, is unreported and is printed in Appendix A, *infra*, p. 10.

The order of the Court of Common Pleas of Marion County, Ohio overruling the motion for new trial is unreported and is printed in Appendix A, *infra*, p. 12.

The journal entry of the Court of Appeals of the Third Appellate Judicial District of Ohio, Marion County affirming the conviction is unreported and is printed in Appendix A, *infra*, p. 12.

The order of the Supreme Court of the State of Ohio dismissing the appeal is reported at 177 Ohio State 19 (1964) and is printed in Appendix A, *infra*, p. 13.

JURISDICTION.

The judgment of the Ohio Supreme Court was entered on September 23, 1964. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3), since the validity of state constitutional and statutory provisions is drawn in question on the ground of their being repugnant to the United States Constitution, and since rights, privileges and immunities under the United States Constitution are claimed to have been violated.

QUESTIONS PRESENTED.

I.

Whether the fact that the prosecution was permitted to comment on the failure of the accused to testify in his own defense in a state criminal proceeding where the state constitutional and statutory provisions specifically permit such conduct, is a violation of the Fifth and Fourteenth Amendments to the United States Constitution.

II.

Whether, in a state criminal proceeding, the charge of the court that the failure of the accused to testify may properly be made a subject of comment by the prosecutor and which permitted the jury to consider the failure of the accused to testify in his own defense as a circumstance in considering his guilt, where the state constitutional and statutory provision specifically permit such conduct, is a violation of the Fifth and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The pertinent portions of the provisions of the Constitution of the State of Ohio are set out below:

"* * * No person shall be compelled in any criminal case to be a witness against himself; *but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel* * * *." Ohio Constitution Article I, Section 10. (Emphasis supplied.)

The pertinent portions of the provisions of the United States Constitution here involved are set out below:

Amendment XIV, Section 1, Clause 2:

"* * * Nor shall any State deprive any person of life, liberty or property without due process of law * * *."

Amendment V:

"* * * No person * * * shall be compelled in any criminal case to be a witness against himself * * *."

The pertinent portion of the State statute herein involved is set out below:

"Section 2945.43, Ohio Revised Code:

"On the trial of a criminal cause, a person charged with an offense may, at his own request, be a witness, but not otherwise. *The failure of such person to testify may be considered by the court and jury and may be made the subject of comment by counsel.*" (Emphasis supplied.)

STATEMENT.

Defendant was indicted, tried and convicted of violating Section 2905.10, Ohio Revised Code, which prohibits procuring a female under eighteen years of age for purposes of prostitution. (R. 47-48.)

At his trial, defendant elected not to testify in his own defense.

In summation, the prosecuting attorney made the following remarks:

> "* * * I think another significant fact is that the defendant, Mr. Howell, himself, did not see fit to take the stand and deny to you any of these accusations that have been made against him. If you were innocent of the charges do you think you would sit there and not try to tell the jurors that it is not so—that the charges are not true or perhaps clarify the record they mentioned to you.
>
> "Why didn't Mr. Howell take the stand? I imagine that is what all of you are wondering about. He didn't see fit to deny any of these things to you—the people who have to decide this case. He didn't take the stand and tell you where he had been gainfully employed at any time, did he? * * *." (R. 46a.)

In its general charge to the jury, the court, after charging as to the presumption of innocence and the requirement that the state prove the defendant guilty beyond a reasonable doubt, charged further on the effect of the defendant's failure to take the stand, as follows:

> "That you may understand, I wish to explain that the Constitution of Ohio provides that no person shall be compelled in any criminal case to be a witness against himself, but that his failure to testify may be considered by the Court and jury and may be made a subject of comment by counsel. The failure of the defendant to take the stand in his own behalf, therefore, is

a circumstance which you may take in consideration in the case with all the other facts and circumstances involved, as shown by the evidence in determining whether or not the defendant is guilty of the crime charged." (R. 54-55.)

Defense counsel objected generally to the entire charge. (R. 58.)

REASONS FOR GRANTING THE WRIT.

That portion of the Ohio Constitution which corresponds to the privilege against self-incrimination embodied in the Fifth Amendment of the United States Constitution reads, in pertinent part, as follows:

"* * * No person shall be compelled, in any criminal case, to be a witness against himself; *but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel* * * *." Ohio Const. Art. I, § 10 (Emphasis supplied).

Pursuant to this constitutional provision, Section 2945.43 of the Ohio Revised Code was enacted. It read as follows:

"On the trial of a criminal cause, a person charged with an offense may, at his own request, be a witness, but not otherwise. *The failure of such person to testify may be considered by the court and jury and may be made the subject of comment by counsel.*" (Emphasis supplied.)

Although before 1912, the failure of an accused to testify in his own behalf raised no inference of guilt and no comment could be made upon his silence, Ohio, by constitutional amendment in 1912, adopted the current rule. Ohio Const. Article I, § 10. See *Leonard v. State*, 100 Ohio St. 456, 472 (1919); *State v. Morrow*, 90 Ohio St. 202 (1914); *Long v. State*, 109 Ohio St. 77, 92-93 (1923).

Pursuant to this constitutional and statutory authority, it has been the custom in state courts of Ohio for defendants in criminal cases to attempt to invoke their constitutional privilege of remaining off the witness stand, only to find that the privilege was an illusory one—that the prosecution, with the participation of the court, was able to utilize his exercise; of the constitutional right to remain silent as a weapon to convict him. E.g. *Halsey v. State*, 42 Ohio App. 291, *error dism'd* 125 Ohio St. 628 (1932); *Cincinnati v. Hyams*, 77 Ohio App. 403 (Hamilton 1945); *Cleveland v. McNea*, 158 Ohio St. 138 (1952); *State v. Butler*, 43 Ohio Ops. 321 (Franklin App. 1949) *reh. den.* 43 Ohio Ops. 325, m.c.o. 6/21/50; *State v. Parks*, 105 Ohio App. 208 (Franklin 1957).

Although it was assumed that such conduct in a *federal* prosecution would violate the provision of the Fifth Amendment of the United States Constitution that "no person * * * shall be compelled in any criminal case to be a witness against himself," *Twining v. New Jersey*, 211 U. S. 78 (1908); *Adamson v. California*, 332 U. S. 46 (1947), and *DeLuna v. United States*, 308 F. 2d 140 (5th Cir. 1962) and *United States v. Ragland*, 306 F. 2d 732 (4th Cir. 1962), it was held that the due process clause of the Fourteenth Amendment would not apply the federal privilege in state proceedings. *Cohen v. Hurley*, 366 U. S. 117, 127-129 (1961); *Snyder v. Massachusetts*, 291 U. S. 97, 105 (1934); *Twining v. New Jersey, supra; Adamson v. California, supra.*

And so the state in the instant case has been permitted by the courts below to conduct the trial of the accused in this time-worn fashion. The accused was permitted by the state to remain silent in recognition of his constitutional right to require the state to prove its case against him with-

out his testimony, but then the state urged the jury to consider his refusal to testify as proof of his guilt and the court benignly charged the jury that it might do so if it wished. His conviction under such circumstances is hardly surprising.

This defendant would perhaps have been permitted to join the countless convicted felons in Ohio and elsewhere who take scant comfort from the fact that they were not required to testify as they serve their prison terms, but for the recent dramatic pronouncement of this Court on June 15, 1964 in *Malloy v. Hogan*, 378 U. S. 1 (1964):

> "The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, *and to suffer no penalty, as held in Twining, for such silence.*" *Malloy v. Hogan, id.* at 8.

Nor can it be urged that the Fourteenth Amendment applies a lesser constitutional standard to state prosecutions than the Fifth Amendment compels in federal criminal proceedings; this Court specifically points out in *Malloy* that it "has rejected the notion that the Fourteenth Amendment applies to the states only a 'watered-down, subjective version of the Bill of Rights.'" *Id.* at 10-11. Pointing out that *Mapp v. Ohio*, 367 U. S. 643 (1961), "necessarily repudiated the *Twining* concept of the privilege as a mere rule of evidence 'best defended not as an unchangeable principle of universal justice but as a law proved by experience to be expedient.' 211 U. S. at 113," *id.* at 9, the Supreme Court specifically overruled *Twining v. New Jersey, supra* and *Adamson v. California* (cases whose facts are almost identical to those of the

case at bar), and severely limited *Cohen v. Hurley*, 366 U. S. 117 (1961), the cases upon which the prosecution here must rely in seeking to sustain the instant conviction.

In the face of the need for clarification of the question of whether the command upon the States of the Fourteenth Amendment to enforce the *federal* prohibition against self-incrimination, renders the Ohio constitutional and statutory provisions here involved invalid, the Ohio Supreme Court dismissed the petitioner's appeal "for the reason that no substantial constitutional question" was presented by this appeal. Since the determination of this question will control the manner in which criminal trials in all state courts are conducted and the extent to which an accused may invoke the privilege against self-incrimination, as well as the validity of a constitution provision of a state as measured against the federal standards, the constitutional questions raised by this appeal are indeed substantial ones—so far as the impact of federal commands upon state criminal proceedings are concerned.

The provision of the Ohio Constitution and the enabling statute which gives an accused the right to remain silent and then punishes him for exercising it must fall as repugnant to the guarantees against self-incrimination contained in the Fifth Amendment, now required of the states by the Fourteenth Amendment. For this reason, the conviction of this defendant must be reversed for prejudicial error of the court in giving its charge to the jury and for misconduct of counsel for the state in final argument.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

BERNARD A. BERKMAN,
Counsel for Petitioner.

GEORGE S. ROEST,
Of Counsel.

APPENDIX A.

Journal Entry of the Court of Common Pleas of Marion County, Ohio.

On the 18th day of March, 1963, the Defendant, Raymond D. Howell, was arraigned in open Court upon the Indictment as returned by the Grand Jury of Marion County, Ohio, January Term, 1963, at which time the Defendant, in the presence of his attorney, George Roest, acknowledged receipt of a copy of the Indictment on March 15, 1963, waived the reading thereof and entered a plea of "Not Guilty" to the charge as contained in the Indictment, it being returned under Ohio Revised Code 2905.10.

Thereafter, this cause came on for trial on April 1, 1963, pursuant to the former orders of this Court, the Defendant, Raymond D. Howell, being brought into open Court in the presence of his attorney, George Roest, and the Prosecuting Attorney, Robert O. Stout, being present in Court.

Thereupon, the venire was called by the Clerk of said Court. According to the records of said Court the following persons were seated as jurors in the above entitled case, duly empaneled and sworn: Harry E. Koch, Richard Wedertz, Agnes Burkhart, Jean Plumley, Mildred Carwile, Mae Felton, Mary M. Wettergreen, Kay E. Mahaffey, Granville A. VanScoy, Earl W. Warwick, Alva F. McClenathan and William S. Guthery.

An alternate juror, Hilda V. Byrd, was duly empaneled and sworn.

Persons called as prospective jurors were excused for cause, by the Court, according to the record in this case, and those persons challenged peremptorily by the State of Ohio, and the Defendant, were released according to the record.

Thereupon, the trial proceeded according to law, until the case was finally submitted to the Jury on April 1, 1963, at which time the alternate juror was excused. Motions were made in the case and either sustained or overruled at the time as shown by the record in this case.

On the 1st day of April, 1963, the following Verdict, in writing, was returned by the Jury, which read in the manner following:

"VERDICT

(Guilty)

COURT OF COMMON PLEAS,
MARION COUNTY, OHIO

THE STATE OF OHIO — Offense:
vs. — No. 4423
RAYMOND D. HOWELL — R. C. 2905.10

We, the Jury in this case, find the Defendant, Raymond D. Howell, Guilty of the offense as charged in the Indictment.

Each of us said jurors signs his name hereto this 1st day of April, 1963.

1. Harry E. Koch
2. Richard Wedertz
3. Agnes Burkhart
4. Jean Plumley
5. Mildred Carwile
6. Mae Felton
7. Mary M. Wettergreen
8. Kay E. Mahaffey
9. Granville A. VanScoy
10. Earl W. Warwick
11. Alva F. McClenathan
12. William S. Guthery
Foreman."

The Defendant, having been present with his attorney in open Court at the time said Verdict was returned and read, the Court thereupon inquired of the Defendant whether he had anything further to say before sentence

was passed, and having nothing to say but what he had already said, and showing no good and sufficient reason why judgment should not be pronounced,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Defendant, Raymond D. Howell, upon his conviction of "Guilty" upon the charge as contained in the Indictment, it being under R. C. Sec. 2905.10, be and hereby is sentenced to be imprisoned in the Ohio State Penitentiary at Columbus, Ohio, for a period of not less than one (1) nor more than five (5) years. IT IS FURTHER ORDERED that pending any appeal or motion for new trial, the bond for the appearance of the Defendant at all future times as may be set by the Court, is hereby set in the amount of $2500.00.

Costs assessed to Defendant.

Ruling on Motion for New Trial Filed April 4, 1963.

The motion by defendant for new trial filed April 4, 1963, is overruled.

Exceptions saved.

A Journal Entry may be drawn accordingly.

Journal Entry of the Court of Appeals of the Third Appellate District of Ohio, Marion County.

(Filed March 24, 1964.)

This cause came on for hearing upon the appeal on questions of law, assignments of error, bill of exceptions, the transcript and the original papers and pleadings from the Court of Common Pleas of Marion County, Ohio, and was argued by counsel, on consideration whereof the Court finds there is no error prejudicial to Defendant-Appellant

in any of the matters specified in the assignment of errors or argued in the briefs.

IT IS, THEREFORE, considered by the Court that the judgment of the Court of Common Pleas be, and the same is hereby affirmed, and that the Appellee recover from the Appellant, his costs herein expended, taxed at $ _____.

And the Court being of the opinion that there was reasonable grounds for this appeal, allow no penalty.

IT IS FURTHER ORDERED that a special mandate be sent to the Common Pleas Court of Marion County, Ohio, for execution upon this judgment.

To all of which Appellant, by his counsel, excepts.

Order of the Supreme Court of the State of Ohio, Dismissing the Appeal.

(Filed September 23, 1964.)

This cause, here on appeal as of right from the Court of Appeals for Marion County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Marion County for entry.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 28 1965
JOHN F. DAVIS, CLERK

No. 789

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

On Petition for Writ of Certiorari to the Supreme Court of Ohio

RAYMOND D. HOWELL,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

ROBERT O. STOUT,
115½ N. Main Street, Marion, Ohio,
Prosecuting Attorney of Marion County, Ohio.
BERNARD A. BERKMAN,
1320 Superior Bldg., Cleveland 14, Ohio,
Counsel for Petitioner.
GEORGE S. ROBST,
187½ E. Center St., Marion, Ohio,
Of Counsel.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio

TABLE OF CONTENTS

Opinions Below 1

Jurisdiction 1

Question presented 2

Statement of the Case 2

Summary of Respondent's Argument 3

Argument 4

The Provision in Article I, Section 10 of the Ohio Constitution permitting comment upon, and Consideration of, a Defendant's Failure to Testify does not Contravene the Fifth Amendment Privilege Against Compulsory Self Incrimination.. 4

A. The Federal no Comment Rule is the Product of Statute, it does not Follow Necessarily from the Fifth Amendment Privilege Against Compulsory Self Incrimination, and it Should not be Imposed by this Court upon the States as a Constitutional Rule of law. 6

B. The comment and consideration sanctioned by the Ohio Constitutional Provision goes only to the weight of the evidence presented against a Defendant. 10

C. Such Comment is to a Patent Fact which the Jury Inevitably Considers. 12

D. Assuming for Argument that Comment upon a Defendant's Failure to Testify or Explain Evidence Presented Against him is Barred by the Fifth Amendment, Petitioner has shown no Prejudice Meriting Reversal. 14

Conclusion 15

Appendix 17

Journal Entry of Court of Common Pleas, Marion County, Ohio. 17

Order, Supreme Court of Ohio, Dismissing Appeal... 19

Ohio Constitution, Article I, Sec. 10 (pertinent portion.) 19

TABLE OF AUTHORITIES CITED

Cases

Adamson v. California, 332 U.S. 46 (1947) 3, 5, 7
Adamson v. California, 332 U.S. 46, 55-58 (1947) 10
Bruno v. United States, 308 U.S. 287 (1939) 6
Caminetti v. United States, 242 U.S. 470, 492-95 (1917) 13
Cincinnati v. Hyams, 77 Ohio App. 403 (1945) 11
Cleveland v. McNea, 158 Ohio St. 138 (1952) 11
Coleman v. Denno, 223 F. Supp. 938, 944-45 (D.C.S.D. N.Y. 1963), Aff'd 330 F. (2d) 441 (2d Cir. 1964) cert. den. 377 U.S. 1003 14
Crawley v. United States, 268 F. (2d) 808 (1959) 12
Halsey v. State, 42 Ohio App. 291 (1932) 11
Interstate Circuit v. United States, 306 U.S. 208, 225-26 (1938) 13
Jenkins v. United States, 58 F. (2d) 556 (1932) 12
Ker v. California, 374 U.S. 23, 31-32 (1963) 6
Koonch v. Cooney, 244 Iowa 153, 55 N.W. (2d) 269, 271 (1952) 8
Leonard v. State, 100 Ohio St. 456, 472 (1919) 11
Local 167 v. United States, 291 U.S. 293, 298 (1934) .. 13
Long v. State, 109 Ohio St. 77, 92-93 (1923) 11
Malloy v. Hogan, 378 U.S. 1 (1964) 5, 15
Mammoth Oil Co. v. United States, 275 U.S. 13, 51-52 (1927) 13
Moore v. United States, 271 F. (2d) 564 (1959) 12
Opinion of the Justices, 300 Mass. 620, 15 N.E. (2d) 662 (1938) 9
Parker v. State, 61 N.J. Law 308, 39 A. 651, 653-54 (1898) 13

People v. Adamson, 27 Calif. (2d) 478, 488-92, 165 Pac. (2d) 3, 8-10 (1946) 10
People v. Ashley, 42 Calif. (2d) 246, 268-69, 267 Pac. (2d) 271, 285 (1954) 10
Ross v. State, 35 Ohio App. 539, 172 N.E. 618 11
Shott v. Tehan, 373 U.S. 240, 10 L. Ed. (2d) 409 (1963); reh. den. 374 U.S. 858, 10 L. Ed. (2d) 1082 (1963).. 12
Snead v. United States, 217 F. (2d) 912, 913-14 (4th Cir. 1954) Cert. den. 348 U.S. 971 (1955) 13
State v. Baker, 115 Ver. 94, 53 A. (2d) 53, 56-63 (1947) 9
State v. Baker, 115 Ver. 94, 53 A. (2d) 53, 59-62 (1947) 14
State v. Cleaves, 59 Me. 298, 8 Am. Rep. 422, 423 (1871) 13
State v. Corby, 28 N.J. 106, 145 A. (2d) 289, 295 (1958) 9
State v. Del Vecchio, 145 Conn. 549, 145 A. (2d) 199, 200 (1958) 8
State v. Ferguson, 226 Iowa 361, 283 N.W. 917, 918-19 (1939) 8
State v. Hayes, 127 Conn. 543, 18 A. (2d) 895, 918-19 (1941) 8
State v. Height, 117 Iowa 650, 91 N.W. 935, 936-40 (1902) 8
State v. Morrow, 90 Ohio St. 202 (1914) 11
State v. Parks, 105 Ohio App. 208 (1957) 11
State v. Sandoval, 59 N.M. 85, 279 Pac. (2d) 850, 852-53 (1955) 9
State v. White, 27 N.J. 158, 142 A. (2d) 65, 70 (1958).. 9
State v. Wolfe, 64 S.D. 178, 266 N.W. 116 (1936) 9
Stewart v. United States, 366 U.S. 1, 2 (1961) 6
Twining v. New Jersey, 211 U.S. 77 (1908) 3, 5, 6
United States v. Di Carlo, 64 F. (2d) 15, 18 (2d Cir. 1933) 13

United States v. De Lucia, 163 F. Supp. 36, 41 (N.D. Ill. 1957), Aff'd 256 F. (2d) 487 (7th Cir. 1958), Cert. den. 358 U.S. 836, reh. den. 358 U.S. 896.... 13
United States v. Leveson, 262 Fed. (2d) 659, 661 (5th Cir. 1959) 13
United States v. Ragland, 306 F. (2d) 732 (1962); Cert. den. 9 L. Ed. (2d) 498 .....11, 12, 14
Wilson v. United States, 146 U. S. 60 (1893) 3, 6
Wilson v. United States, 162 U. S. 613, 40 L. Ed. 1090 (1896) 12

Constitutions

Constitution of New Mexico, Art 2, Sec. 15 9
Constitution of Ohio, Art. 1, Sec. 10.....2, 3, 4, 5, 10, 19
Constitution of the United States:
Fifth Amendment 2, 3, 4, 5, 6, 7, 14, 16
Fourteenth Amendment 5

Statutes

Ohio Revised Code:
Sec. 2905.10 .....2, 19
Sec. 2945.43 5
28 U. S. C. Sec. 1257 (3) 1
28 U. S. C. Sec. 3481 6

Others

Model Code of Evidence, Rule 201 (3) (1942) 10
Uniform Rules of Evidence, Rule 23 (4) (1953) 10
2 Wigmore, Evidence (3d ed. 1940) Secs. 285-91 13
4 Wigmore, Evidence (3d Ed. 1940) Sec. 1071, p. 70.. 12
8 Wigmore, Evidence (McNaughton Rev. 1961)
Sec. 2272, p. 427, f.n. 2 7
Sec. 2272 (1) (e), P. 439 13
Sec. 2273 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 789

RAYMOND D. HOWELL,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

---

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The decision and opinion of the Supreme Court of Ohio is reported in 177 Ohio State 19 (1964) and is printed in Appendix A, infra, p. 18.

The journal entry of the Common Pleas Court of Marion County, Ohio, the Court of original jurisdiction, is unreported and is printed in Appendix A, infra, p. 17.

JURISDICTION

The jurisdiction of this Court was invoked by Petitioner under 28 U.S.C. Sec. 1257 (3).

QUESTION PRESENTED

Whether comment upon by counsel, and consideration as a circumstance by the court and jury of, a defendant's failure to testify, authorized by Article I, Section 10 of the Constitution of Ohio contravenes the privilege against compulsory self incrimination afforded by the Fifth Amendment.

STATEMENT OF THE CASE

On November 22, 1962, an affidavit charging petitioner with violation of Ohio Revised Code Section 2905.10, which prohibits procuring a female under eighteen years of age for purposes of prostitution, harboring her in a house of assignation, or procuring her for intercourse with others, was filed by the Marion Police Department.

Petitioner, represented by Attorney George Roest, employed by petitioner, (as he was through his trial and all subsequent proceedings) was arraigned in Marion Municipal Court, entered a plea of not guilty, waived preliminary examination and was bound over to grand jury. Petitioner was released on bond throughout these proceedings.

On March 15, 1963, petitioner was indicted by the grand jury. On April 1, 1963 the cause came on for jury trial, and on the same date the jury returned a verdict finding petitioner guilty as charged under O.R.C., 2905.10.

On March 24, 1964, the Court of Appeals affirmed the conviction and on September 23, 1964 the Supreme Court of Ohio dismissed the appeal and affirmed the conviction.

Counsel for Defendant made no objection to closing argument by counsel for the State or to the charge of the Court, except a general objection.

On voir dire examination of the jurors, counsel for defendant stated that there would be some evidence that defendant has been convicted of misdemeanors in the past,

and does have a record, which will probably be brought out on testimony.

Also, in his opening statement, counsel for defendant stated the defense will show that there may be many things Mr. Howell has done.

The defendant did not testify during trial.

SUMMARY OF RESPONDENT'S ARGUMENT

The provisions in Article I, Section 10 of the Ohio Constitution permitting comment upon, and consideration by court and jury of, a criminal defendant's failure to testify, does not contravene the Fifth Amendment privilege against self incrimination but rather is perfectly consistent with recognition of the privilege.

Since its first Constitution in 1802, Ohio has afforded to criminal defendants a privilege against compulsory self incrimination. Since the 1912 Amendment to Article I, Section 10 which added the above mentioned provision, Ohio has permitted comment by counsel upon, and consideration by the court and jury of, a defendant's failure to testify as consistent with the privilege. Both in Twining v. New Jersey, 211 U.S. 77 (1908) and in Adamson v. California, 332 U.S. 46 (1947), this court recognized that a state could reasonably conclude that a rule of law sanctioning comment upon a defendant's failure to testify was consistent with the privilege against self incrimination.

Nor does the fact that a no comment rule is followed in the federal courts mean that a preclusion from comment on a defendant s failure to testify is a necessary concomitant of the Fifth Amendment privilege. When this Court first pronounced the federal no comment rule in Wilson vs. United States, 146 U.S. 60 (1893), it predicated it not upon the Fifth Amendment but rather upon a statute which, while making a defendant competent to testify if he so re-

quested, declared his failure to testify was to create no presumption against him. The rule enunciated in WILSON was established by this Court in its supervisory rule over the federal courts and the statute there construed represented a legislative policy determination by Congress.

But a legislative policy determination regulatory of the federal courts should not be imposed by this Court upon the states as a constitutional mandate. Each state should be free, within the limitations of due process, to decide whether, as a matter of policy, it will permit, as consistent with the privilege, comment upon, and consideration by court and jury of a defendant's failure to testify.

While a large majority of the states have concluded that comment and consideration of a defendant's failure to testify should not be permitted, several states have concluded that such comment and consideration may and should be permitted.

And, certainly the decision by such states to permit comment and consideration cannot be characterized as illogical since, as a practical matter, juries will not be oblivious to the fact that a defendant does not testify.

ARGUMENT

The provision in Article I, Section 10 of the Ohio Constitution permitting comment upon, and consideration of, a defendant's failure to testify does not contravene the Fifth Amendment privilege against compulsory self incrimination.

Petitioner attacks the constitutionality of the provision in Article I, Section 10 of the Ohio Constitution which permits comment upon by counsel, and consideration by the court and jury of, the failure of a defendant to testify. Since this Court has now held that the Fifth Amendment priv-

ilege against compulsory self incrimination is protected by the Fourteenth Amendment against abridgement by the states, Malloy v. Hogan, 378 U.S. 1 (1964), the question left unanswered by Adamson v. California, 332 U.S. 46 (1947), and Twining v. New Jersey, 211 U.S. 77 (1908), is squarely presented by this case, namely:

Is the privilege against compulsory self incrimination violated by the provision in the Ohio Constitution which authorizes comment upon and consideration of a defendant's failure to testify and explain or deny the evidence presented against him?

Ohio also has a statutory provision, Ohio Revised Code Section 2945.43, which provides:

> "On the trial of a criminal cause, a person charged with an offense may, at his own request, be a witness, but not otherwise. The failure of such person to testify may be considered by the court and jury and may be made the subject of comment by counsel."

The language in the Fifth Amendment setting out the privilege against compulsory self incrimination, "No person . . . shall be compelled in any criminal case to be a witness against himself," is reflected verbatim in Article I, Section 10 of the Ohio Constitution. Since its first constitution in 1802, Ohio has recognized and afforded to criminal defendants the privilege against compulsory self incrimination so basic to the tradition of the Common Law. Ohio Const., Art. I, Section 10. Nor is the comment and consideration sanctioned by Ohio since the 1912 Amendment to Art. I, Section 10, inconsistent with recognition of the privilege against compulsory self incrimination.

Ohio has applied the 1912 Amendment, as well as O. R. C. 2945.43, since their enactment. Prior to the amendment Ohio had precluded comment on a defendant's failure to testify.

A. The federal no comment rule is the product of statute, it does not follow necessarily from the Fifth Amendment privilege against compulsory self incrimination, and it should not be imposed by this court upon the states as a constitutional rule of law.

When this Court first pronounced the federal no comment rule, it predicated it, not upon the Fifth Amendment, but rather upon a federal statute which, while conferring upon a defendant the right at his request to appear as a witness on his own behalf, also declared that his failure to so request "shall not create any presumption against him." Wilson v. United States, 149 U. S. 60 (1893); see also Bruno v. United States, 308 U. S., 287 (1939).

This statute upon which the federal no comment rule is predicated (28 U. S. C. Sec. 3481) represents a policy decision by Congress as to the manner in which the privilege against self incrimination is to be protected in the federal courts. Stewart v. United States, 366 U. S. 1, 2 (1961). But this legislative policy determination regulatory of the federal courts should not be imposed upon the states as a constitutional mandate. Cf. Ker v. California, 374 U. S. 23, 31-32 (1963).

In Twining v. New Jersey, 211 U. S. 77 (1908), this Court recognized that a state could, consistent with the privilege against self incrimination, allow comment upon a defendant's failure to testify when it said at page 114:

> "We have assumed only for the purpose of discussion that what was done in the case at bar was an infringement of the privilege against self incrimination. We do not intend, however, to lend any countenance to the truth of that assumption. The courts of New Jersey, in adopting the rule of law which is complained of here, have deemed it consistent with the privilege itself, and not a denial of it. The reasoning by which this view is supported will be found in the cases cited from New Jersey and Maine, and see Queen v. Rhodes (1899) 1

> Q. B. 77; Ex parte Kops (1894) A. C. 650. The authorities upon the question are in conflict. We do not pass upon the conflict, because, for the reasons given, we think that the exemption from compulsory self incrimination in the courts of the states is not secured by any part of the federal constitution."

Similarly in Adamson v. California, supra, while assuming for purposes of the decision that the comments sanctioned by the California procedure would, if it occurred in a Federal prosecution, infringe the defendant's privilege against self incrimination under the Fifth Amendment, this Court said in footnote 6 at 332 U. S. 50:

> "The California Law protects a defendant against compulsion to testify, though allowing comment upon his failure to meet evidence against him. The Fifth Amendment forbids compulsion on a defendant to testify. (Citations). A Federal statute that grew out of the extension of permissible witnesses to include those charged with offenses negatives a presumption against an accused for failure to avail himself of the right to testify in his own defense. (Citations). It was this statute which is interpreted to protect the defendant against comment for his claim of privilege. (Citations)."

That a rule precluding comment upon or consideration of a defendant's failure to testify is not a necessary consequence of recognition of the privilege against self incrimination is persuasively shown by the fact that nearly every state has felt compelled to treat specifically with the comment and consideration problem, either by constitution or statute. See generally, 8 Wigmore, Evidence (McNaughton Rev. 1961) Section 2272, p. 427, fn. 2. While a large majority of the states do follow a no comment rule, the decision to do so is is almost invariably predicated upon language, either in constitution or statute, which forbids comment upon a defendant's failure to testify, or forbids

that any presumption or inference be drawn from such failure to testify, or which declares that a defendant's failure to testify shall not prejudice him. Ibid.

Persuasive authority for the proposition that a rule sanctioning comment and consideration is not inconsistent with recognition of the privilege against self incrimination is also found in the decisions from those states which, while recognizing the privilege, do permit comment upon and/or consideration of a defendant's failure to testify.

Connecticut sanctions instructions to the jury on the failure of an accused to testify notwithstanding a constitutional provision that an accused shall not be compelled to give evidence against himself and a statute which provides that the neglect or refusal of the accused party to testify shall not be commented upon to the court or jury. State v. Hayes, 127 Conn. 543, 18 A. (2d) 895, 918-19 (1941). Connecticut also permits adverse inferences to be drawn from the defendant's failure to testify once the state has made out a prima facie case of guilt. State v. DelVecchio, 145 Conn. 549, 145 A. (2d) 199, 200 (1958).

Iowa, which has no constitutional provision specifically providing for the privilege against self incrimination, construes its due process provision as including the right against self incrimination. See e. g. Koonch v. Cooney, 244 Iowa 153, 55 NW (2d) 269, 271 (1952); State v. Height, 117 Iowa 650, 91 NW 935, 936-40 (1902). And, Iowa permits comment upon a defendant's failure to testify finding sanction for such procedure in an amendment to its statutory treatment of the problem which deleted language to the effect that a defendant's failure to testify should have no weight against him and should not be the subject of comment. State v. Ferguson, 226 Iowa 361, 283 NW 917, 918-19 (1939).

New Jersey, which also has no constitutional provision setting out a privilege against self incrimination, has treated the privilege as one of statutory origin. See State v. White, 27 N. J. 158, 142 A. (2d) 65, 70 (1958). Yet as consistent with recognition of the privilege, it follows a rule which permits, from the failure of an accused to testify, the drawing of an inference that he could not truthfully deny the inculpatory facts adduced against him. State v. Corby, 28 N. J. 106, 145 A. (2d) 289, 295 (1958).

New Mexico has a constitutional provision to the effect that no person shall be compelled to testify against himself in a criminal proceeding. New Mexico Const., Art. 2, Sec. 15. In deciding a question virtually identical to the one now confronting this court, the Supreme Court of New Mexico held that a court rule which sanctioned comment and argument upon the failure of an accused to testify does not violate and is not inconsistent with the constitutional privilege against self incrimination. State v. Sandoval, 59 N. M. 85, 279 Pac. (2d) 850, 852-53 (1955).

The Sandoval decision is representative of the realistic modern approach to this question. The Vermont Supreme Court in 1947 reached the same result after an extensive analysis and comment upon some earlier cases from other states which had reached a contrary result. State v. Baker, 115 Vt. 94, 53 A. (2d) 53, 56-63 (1947). Earlier the South Dakota Supreme Court by a 3-2 decision held that a statute sanctioning comment was violative of the privilege. State v. Wolfe, 64 S. D. 178, 266 NW 116 (1936). The New Mexico court in Sandoval found the South Dakota dissents persuasive. In an advisory opinion the Massachusetts Supreme Court, with one dissent, reached the same result as the South Dakota Court. In re: Opinion of the Justices, 300 Mass. 620, 15 NE (2d) 662 (1938).

California has a specific constitutional provision which permits comment and consideration which goes simply to the weight which may be afforded to evidence presented in the case against the Defendant which he fails to explain or deny by his testimony and the failure of a defendant to testify is not affirmative evidence of any fact. Adamson v. California, 332 U. S. 46, 55-58 (1947); People v. Adamson, 27 Calif. (2d) 478, 488-92, 165 Pac. (2nd) 3, 8-10 (1946); People v. Ashley, 42 Calif. (2d) 246, 268-69, 267 Pac. (2d) 271, 285 (1954).

Further, authority for the proposition that comment upon and consideration of a defendant's failure to testify is not inconsistent with the privilege against compulsory self incrimination is found in the Uniform Rules of Evidence and in the Model Code of Evidence, both of which sanction comment upon and consideration of the failure of an accused to testify. Uniform Rules of Evidence, Rule 23 (4) (1953); Model Code of Evidence Rule 201 (3) (1942).

We submit that the decision as to whether or not comment and consideration is to be permitted as to a defendant's failure to testify is a policy determination which each state should be free to resolve within the bounds of due process and that a preclusion from such comment and consideration is not necessary to compliance with the Fifth Amendment privilege against self incrimination.

B. The comment and consideration sanctioned by the Ohio Constitutional provision goes only to the weight of the evidence presented against a defendant.

Ohio has a specific constitutional provision setting out the privilege against self incrimination which also sanctions consideration by the court and jury and comment by court and counsel upon the failure of the accused to testify. Ohio Const., Art. I, Sec. 10. This sanction for consideration and comment which is also provided for by statute has

received the approval of the courts of Ohio. Cleveland v. McNea, 158 O. S. 138 (1952); Long v. State, 109 O. S. 77, 92-93 (1923); Leonard v. State, 100 O. S. 456, 472 (1919); State v. Morrow, 90 O. S. 202 (1914); State v. Parks, 105 O. App. 208 (1957); Cincinnati v. Hyams, 77 O. App. 403 (1945); Halsey v. State, 42 O. App. 291 (1932).

The opinions of the Courts in the above cited Ohio cases, where the question of comment has been raised on appeal, refer to such comment in relation to defendant's failure to testify in view of the overwhelming, damaging and incriminating evidence that had been presented. Cleveland v. McNea, supra; Long v. State, supra; Cincinnati v. Hyams, supra.

However, the comment authorized by the Constitution does not contemplate or permit a substitution of argument for evidence or the introduction of evidence by argument. Ross v. State, 35 O. App. 539, 172 N.E. 618.

The Court, in the present case, charged

> "and in order to convict the defendant on trial, the prosecution must establish his guilt by the evidence beyond a reasonable doubt." (R-48).

Silence of an accused, or comment thereon, furnishes none of the affirmative evidence to establish the elements of an offense.

In United States v. Bagland, 306 F (2d) 782 (1962), the question of comment by the prosecution was raised on the appeal. The conviction was affirmed by the Circuit Court of Appeals. This Court denied certiorari. [9 L. Ed. (2d) 498, (1963)]. In the opinion we find the following language:

"The jury need not entirely disregard defendant's failure to explain highly suspicious circumstances, and if evidence is sufficient to support inference of guilt and defendant fails to offer reasonable explanation consistent with innocence, failure may be considered."

"Nevertheless, protection of those fundamental rights does not mean that the failure of the defendant in a criminal case to explain highly suspicious circumstances, must be entirely disregarded by the trier of fact."

U. S. v. Ragland, 306 F (2d) 732 (1962); cert. denied 9 L. Ed. (2d) 498.

See also: Moore v. U. S. 271 F (2d) 564 (1959)
Wilson v. U. S. 162 U. S., 613, 40 L. Ed. 1090 (1896)
Jenkins v. U. S. 58 F (2d) 556 (1932)
Crawley v. U. S. 268 F. (2d) 808 (1959)

In Shott v. Tehan, an Ohio case, appellant was convicted of violation of the securities law. Appellant did not testify and on appeal raised the question of the prosecution's comment upon the failure to testify. This Court dismissed the appeal but treated the same as an application for writ of certiorari, which was denied. 373 U. S. 240, 10 L. Ed. (2d) 409 (1963). A petition for rehearing was likewise denied. 374 U. S. 858, 10 L. Ed. (2d) 1082 (1963).

C. Such comment is to a patent fact which the jury inevitably considers.

That an innocent person when confronted by an accusation will tender a denial and protest his innocence is basic fact of human nature which has found expression in our system of law in many ways. Long before any question of the propriety of comment on a defendant's failure to testify had arisen, the law recognized as part of the admission exception to the hearsay rule, silence or equivocal conduct by a person confronted with an accusation. See generally, 4 Wigmore, Evidence (3d Ed. 1940) Sec. 1071, p. 70.

This concept also finds expression in the rule followed in both civil and criminal cases which permits, from the failure of a party or a defendant to produce evidence which it lies within his power to produce, the drawing of an in-

ference that the facts are unfavorable to his cause. Mammoth Oil Co. v. United States, 275 U. S. 13, 51-52 (1927); Local 167 v. United States, 291 U. S. 293, 298 (1934); Interstate Circuit v. United States, 306 U. S. 208, 225-26 (1938); see generally, 2 Wigmore, Evidence (3d Ed. 1940) Secs. 285-91; 8 Wigmore, Evidence (McNaughton Rev. 1961) Sec. 2273.

Of similar origin is the generally accepted rule of evidence which allows adverse inferences to be drawn when a party to a civil suit fails to testify and contravert evidence which has been presented against him concerning matters presumptively within his knowledge. Snead v. United States, 217 F. (2d) 912, 913-14 (4th Cir. 1954), Cert. denied 348 U. S. 971 (1955); United States v. Leveson, 262 Fed. (2d) 659, 661 (5th Cir. 1959); United States v. DeLucia, 163 F. Supp. 36, 41 (N. D. Ill. 1957), Aff'd 256 F. (2d) 487 (7th Cir. 1958), Cert. denied 358 U. S. 836, Rehearing denied 358 U. S. 896. See generally, 8 Wigmore, Evidence (McNaughton Rev. 1961) Sec. 2272 (1) (e), p. 439.

And, even under the Federal no comment rule, a defendant in a criminal case who does take the stand may not stop short in his testimony and omit to explain incriminating circumstances and events in evidence against him without subjecting his silence in that regard to the comments and inferences which become appropriate. Caminetti v. United States, 242 U. S. 470, 492-95 (1917).

Recognizing the universal acceptance of the concept that silence in the face of accusation is indicative of guilt, it would be illogical to conclude other than that the fact a defendant fails to testify will be noted by the jury and that the jury will draw certain inferences from that fact. See United States v. DiCarlo, 64 F. (2d) 15, 18 (2d Cir. 1933); State v. Cleaves, 59 Me. 298, 8 Am. Rep. 422, 423 (1871); Parker v. State, 61 N. J. Law 308, 39 A. 651, 653-54

(1898); State v. Baker, 115 Ver. 94, 53 A. (2d) 53, 59-62 (1947).

Indeed, to find in the Fifth Amendment a rule which would preclude triers of fact from considering so significant a fact would be to demean the Constitution and to place it at odds with common sense. As Justice Frankfurter observed while concurring in the Adamson case:

> "Only a technical rule of law would exclude from consideration that which is relevant, as a matter of fair reasoning, to the solution of a problem. Sensible and just minded men, in important affairs of life, deem it significant that a man remains silent when confronted with serious and responsible evidence against himself which it is within his power to contradict. The notion that to allow jurors to do that which sensible and right minded men do every day violates the 'immutable principles of justice' as conceived by a civilized society is to trivialize the importance of 'due process' ". 332 U. S. at 60-61.

D. Assuming for argument that comment upon a defendant's failure to testify or explain evidence presented against him is barred by the Fifth Amendment, petitioner has shown no prejudice meriting reversal.

Should this Court now conclude that comment upon defendant's failure to explain or deny by his testimony evidence presented against him is barred by the Fifth Amendment privilege against self incrimination, it cannot be said after a consideration of the record below and the overwhelming evidence of petitioner's guilt that he was prejudiced by the prosecutor's comments or by the court's instruction. See Coleman v. Denno, 223 F. Supp. 938, 944-45 (D. C. S. D.—N. Y. 1963), Aff'd 330 F 2d 441 (2d Cir. 1964), Cert. denied 377 U. S. 1003. U. S. v. Ragland, 306 F (2d) 732 (1962); cert. denied 9 L. Ed. (2d) 498.

The petitioner raises no question as to his conviction on the evidence but asserts only prejudicial error in the charge of the court and comment by counsel.

No specific objection was made to the argument of counsel for the state during argument nor to the charge of the court referring to defendant's failure to testify.

However, on voir dire examination of the jury, counsel for petitioner asked the jurors the following final question:

"There will be some evidence that Mr. Howell (defendant) has been convicted of misdemeanors in the past, and does have a record, which will probably be brought out in testimony. Is there anyone here who believes if a man has been convicted of things in the past he should be convicted on his past record? Is there anybody who feels that way?"

And in his opening statement to the jury, counsel for defendant stated:

". . . The defense will show that there may be many things Mr. Howell has done but he is charged with this particular charge . . ."

Based upon the record, we submit that defendant was not prejudiced by the comment or charge.

CONCLUSION

The case of Malloy v. Hogan, 378 U. S. 1 (1964) involved a refusal to answer questions, resulting in contempt proceedings and imprisonment. The present case concerns comment on failure to testify. In the Twining and Adamson cases, supra, this Court assumed without deciding or lending any countenance to the truth of the assumption that comment on the failure to testify would infringe the privilege against self incrimination.

Valid distinctions can be drawn between subjecting the accused to an inference of guilt for refusing to testify and

physically forcing him to testify by use, for example, of the contempt power. The contempt power punishes the defendant for silence itself, before there has been any finding of guilt. Comment, on the other hand, uses silence only as a circumstance of guilt, and punishes the defendant, if at all, only for the substantive offense with which he is charged.

We would submit that a difference exists between the specific provisions of the Bill of Rights and the uncertain demands of due process, which this Court has hitherto considered on a case-by-case basis. The two tests might require the same result in the area of coerced confessions, and due process requirements would prevent a state from direct compulsion of incriminating testimony. However, under our system of federalism, which should recognize relevant differences existing between state and federal criminal law enforcement, compelled uniformity of standards between state and federal assertion of a federally guaranteed right is questioned by many authorities. We submit that the Court could properly interpret the Fifth Amendment privilege as a prohibition only against using either physical abuse or the contempt power to force the defendant to speak.

For the foregoing reasons set forth in this brief, respondent respectfully urges that the conviction be affirmed and the petition be denied.

Dated, Marion, Ohio,
January ...., 1965.

Robert O. Stout,
Prosecuting Attorney,
Marion County, Ohio.

APPENDIX

Journal Entry of the Court of Common Pleas of Marion County, Ohio.

On the 18th day of March, 1963, the Defendant, Raymond D. Howell, was arraigned in open Court upon the Indictment as returned by the Grand Jury of Marion County, Ohio, January Term, 1963, at which time the Defendant, in the presence of his attorney, George Roest, acknowledged receipt of a copy of the Indictment on March 15, 1963, waived the reading thereof and entered a plea of "Not Guilty" to the charge as contained in the Indictment, it being returned under Ohio Revised Code 2905.10.

Thereafter, this cause came on for trial on April 1, 1963, pursuant to the former orders of this Court, the Defendant, Raymond D. Howell, being brought into open Court in the presence of his attorney, George Roest, and the Prosecuting Attorney, Robert O. Stout, being present in Court.

Thereupon, the venire was called by the Clerk of said Court. According to the records of said Court the following persons were seated as jurors in the above entitled case, duly empaneled and sworn: Harry E. Koch, Richard Wedertz, Agnes Burkhart, Jean Plumley, Mildred Carwile, Mae Felton, Mary M. Wettergreen, Kay E. Mahaffey, Granville A. VanScoy, Earl W. Warwick, Alva F. McClenathan and William S. Guthery.

An alternate juror, Hilda V. Byrd, was duly empaneled and sworn.

Persons called as prospective jurors were excused for cause, by the Court, according to the record in this case, and those persons challenged peremptorily by the State of Ohio, and the Defendant, were released according to the record.

Thereupon, the trial proceeded according to law, until the case was finally submitted to the Jury on April 1, 1963, at which time the alternate juror was excused. Motions were made in the case and either sustained or overruled at the time as shown by the record in this case.

On the 1st day of April, 1963, the following Verdict, in writing, was returned by the Jury, which read in the manner following:

"VERDICT
(Guilty)

COURT OF COMMON PLEAS,
MARION COUNTY, OHIO

THE STATE OF OHIO — Offense:
vs. — No. 4423
RAYMOND D. HOWELL — R. C. 2905.10

We, the Jury in this case, find the Defendant, Raymond D. Howell, Guilty of the offense as charged in the Indictment.

Each of us said jurors signs his name hereto this 1st day of April, 1963.

1. Harry E. Koch
2. Richard Wedertz
3. Agnes Burkhart
4. Jean Plumley
5. Mildred Carwile
6. Mae Felton
7. Mary M. Wettergreen
8. Kay E. Mahaffey
9. Granville. A. VanScoy
10. Earl W. Warwick
11. Alva F. McClenathan
12. William S. Guthery
Foreman."

The Defendant, having been present with his attorney in open Court at the time said Verdict was returned and read, the Court thereupon inquired of the Defendant whether he had anything further to say before sentence was passed, and having nothing to say but what he had

already said, and showing no good and sufficient reason why judgment should not be pronounced,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Defendant, Raymond D. Howell, upon his conviction of "Guilty" upon the charge as contained in the Indictment, it being under R. C. Sec. 2905.10, be and hereby is sentenced to be imprisoned in the Ohio State Penitentiary at Columbus, Ohio, for a period of not less than one (1) nor more than five (5) years. IT IS FURTHER ORDERED that pending any appeal or motion for new trial, the bond for the appearance of the Defendant at all future times as may be set by the Court, is hereby set in the amount of $2500.00.

Costs assessed to Defendant.

Ohio Constitution (Pertinent Portion)

"* * * No person shall be compelled in any criminal case to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel * * *." Ohio Constitution Article I, Section 10.

Order of the Supreme Court of the State of Ohio, Dismissing the Appeal.

(Filed September 23, 1964.)

This cause, here on appeal as of right from the Court of Appeals for Marion County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Marion County for entry.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 16 1965
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

No. 789.
OCTOBER TERM, 1964.

RAYMOND D. HOWELL,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO.

REPLY BRIEF OF PETITIONER TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

BERNARD A. BERKMAN,
1320 Superior Building,
Cleveland 14, Ohio,
Counsel for Petitioner.

GEORGE S. ROEST,
187½ E. Center St.,
Marion, Ohio,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—PHONE: 621-5647

TABLE OF CONTENTS.

Reply Brief of Petitioner to Respondent's Brief in Opposition to Petition for Writ of Certiorari 1

A. The "no comment" rule is a command of the Fifth and Fourteenth Amendments 3

B. The constitutional validity of the provision of the Ohio Constitution in issue here is not well settled at all 8

C. A jury charge by the court that the state must establish the guilt of the accused by evidence beyond a reasonable doubt does not cure the constitutional defect 10

D. The prosecutor's comment and the court's charge to the jury were prejudicial to defendant even though, in the absence of such comment and instructions, the jury might have considered the failure of the accused to testify 11

E. Petitioner has properly preserved the issues for review and shown prejudice 12

Conclusion 15

Application to Consolidate With Another Pending Case in Advance of Argument or, in the Alternative, in Advance of Re-Argument 17

TABLE OF AUTHORITIES.

Cases.

Adamson v. California, 332 U. S. 46 (1947) ... 3, 7, 13

Bruno v. United States, 308 U. S. 287 (1939) ... 3

Counselman v. Hitchcock, 142 U. S. 547 (1892) ... 7

DeLuna v. United States, 308 F. 2d 140 (5th Cir. 1962) ... 3, 6, 12

Fahy v. Connecticut, 375 U. S. 85 (1963) ... 11, 12

Gompers v. United States, 233 U. S. 604 (1915) ... 10

Griffin v. California, No. 202, October Term, 1964 ... 9

Grunewald v. United States, 353 U. S. 391 (1957) ... 14

Hayes v. Smith, 62 Ohio St. 161 (1960) ... 13

Johnson v. United States, 318 U. S. 189 (1943) ... 4

Krulewitch v. United States, 336 U. S. 440 (1949) ... 11

Landesman v. Western Reserve University, 132 Ohio St. 131 (1936) ... 13

Malloy v. Hogan, 378 U. S. 1 (1964) ... 1, 2, 3, 5, 6, 8, 9, 10, 13

Mapp v. Ohio, 367 U. S. 643 (1961) ... 7

Maryland v. Baltimore Radio Show, 338 U. S. 912 (1950) ... 8

Nash v. United States, 54 F. 2d 1006 (2d Cir. 1932) 11

Phelin v. Kenderdine, 20 Pa. 354 (1853) ... 4

Quinn v. United States, 349 U. S. 155 (1950) ... 7

Rosenberry v. Chumney, 171 Ohio St. 48 (1960) ... 13

Shott v. Tehan, 373 U. S. 240, rehearing denied 374 U. S. 858 (1963) ... 8, 9

Simko v. Miller, 133 Ohio St. 345 (1938) ... 13

Stewart v. United States, 366 U. S. 1 (1961) 5

Thatcher v. Penn., O & D Rd. Co., 33 Ohio App. 242 (Lucas 1928) 13

Twining v. New Jersey, 211 U. S. 77 (1908) 3, 13

Ullman v. United States, 350 U. S. 422 (1955) 7

United States v. Gainey, __ U. S. __, No. 13, October Term, 1964, 33 U. S. L. Week 4200 (March 1, 1965) 5, 9

United States v. Ragland, 306 F. 2d 732 (4th Cir. 1962) 6

United States v. Tehan, 337 F. 2d 990 (6th Cir. 1964) petition for certiorari filed 2/4/65 *sub nom. Tehan v. Shott*, 33 U. S. L. Week 3275 ..... 6, 9

Wilson v. United States, 149 U. S. 60 (1893) 3, 5, 14

Constitution and Statutes.

Constitution of the United States:

Fifth Amendment 2, 3, 4, 5 7, 8, 9, 10, 12, 14

Fourteenth Amendment 3

Ohio Revised Code § 2321.03 13

18 U. S. C. A. § 3481 3

In the Supreme Court of the United States

No. 789.
OCTOBER TERM, 1964.

RAYMOND D. HOWELL,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO.

REPLY BRIEF OF PETITIONER TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondent's brief admits that the record in the case at bar presents squarely to this Court the question of the validity, in the light of *Malloy v. Hogan,* 378 U. S. 1 (1964), of the provision in the Ohio Constitution which permits counsel to comment adversely upon, and the Court and jury to consider in weighing the guilt of the accused, his constitutional refusal to testify in his own defense (RB. 5).[1]

[1] References to Respondent's brief throughout this brief will be by "RB" followed by a page number. References to the transcript of the record will be by "R" followed by a page number and "P" will precede the page number of references to the petition for certiorari. Emphasis and bracketed material, unless otherwise indicated, has been supplied.

Respondent seeks, however, to evade a holding by this Court that the Ohio constitutional provision fails to meet the *federal* standards of the Fifth Amendment, now applicable to the states as a result of *Malloy v. Hogan, supra,* by urging that (A) the "no comment" rule[2] is not a requirement of the Fifth Amendment;[3] (B) the provision of the Ohio Constitution here involved has been upheld in Ohio, denied review by this Court and hence its constitutional validity is settled;[4] (C) since the prosecutor's comment to the jury is not technically evidence, a jury charge by the Court that the state must establish the guilt of the accused by evidence beyond a reasonable doubt cures any constitutional impediment;[5] (D) since the prosecutor's comment only points out what would be obvious to the jury without his comment, it is not prejudicial;[6] and (E) petitioner has neither properly preserved the issues for review nor shown prejudice requiring reversal.

These contentions will be considered in sequence below.

---

[2] Unless otherwise indicated, the "no comment" rule as used in this brief will include not only prohibition of the prosecutor's adverse comment to the jury, but also the court's charge to the jury that it may consider the silence of the accused as an element of guilt.

[3] RB. 6-10, 15-16.

[4] RB. 10-12.

[5] RB. 11-12.

[6] RB. 12-14.

A.

The "no comment" rule is a command of the Fifth and Fourteenth Amendments.

There can be little argument with the contention that the "no comment" rule as employed in the federal courts has not yet been squarely held to be a requirement of the Fifth Amendment self-incrimination clause by this Court. Until *Malloy*, there was no need for this Court to consider the constitutional question in state criminal proceedings;[7] the existence of a federal statute on the subject[8] and this Court's supervisory function in federal criminal proceedings have precluded the necessity of adjudication of the constitutional question in federal criminal appeals.[9]

The tacit recognition by Respondent of the importance of the issue presented by this case[10] coupled with its persuasive argument that the question is an open one, compels the conclusion that, rather than opposing it, Respondent's Brief in fact *supports* the petition for writ of certiorari. Nevertheless, even in the absence of a direct holding on the question, there is abundant authority, based upon sound reasoning, in the remarks of individual justices of

---

[7] How close this Court has come to deciding this issue without actually doing so in *Twining v. New Jersey*, 211 U. S. 77 (1908) and *Adamson v. California*, 332 U. S. 46 (1947) has been abundantly described by Respondent. RB. 6-7.

[8] 18 U. S. C. A. § 3481.

[9] E.g., *Wilson v. United States*, 149 U. S. 60 (1893); *Bruno v. United States*, 308 U. S. 287 (1939).

[10] There is no need to belabor the obvious fact that the issues presented here are central to the conduct of state criminal proceedings, not only in the six states which, by statute or judicial decision, permit comment upon, and consideration of, the exercise of the privilege, see *DeLuna v. United States*, 308 F. 2d 140, 151, f.n. 35 (5th Cir. 1962), but also in the other states, which in the absence of federal constitutional compulsion, may enact similar legislation. Nor should the potential effect upon *federal* criminal prosecutions of a holding that the "no comment" rule is of constitutional, as well as statutory, origin, be ignored.

this Court and lower court opinions to support petitioner's contention that this Court should in interpreting the breadth of the Fifth Amendment, strike down the provision of the Ohio Constitution permitting comment upon and consideration of the silence of the accused.

In *Johnson v. United States*,[11] affirming a federal conviction upon other grounds, Mr. Justice Douglas, speaking for the Court, took occasion to remark:

> "* * * where the claim of privilege is asserted and unqualifiedly granted, *the requirements of fair trial may preclude any comment.* That certainly is true where the claim of privilege could not properly be denied."

Quoting with approval from *Phelin v. Kenderdine*, 20 Pa. 354, 363 (1853), the Court continued:

> " 'The claim of privilege and its allowance is properly no part of the evidence submitted to the jury, and *no inferences whatever can be legitimately drawn by them from the legal assertion by the witness of his constitutional right.* The allowance of the privilege would be a mockery of justice, if either party is to be affected injuriously by it.' " [12]

And while limiting its remarks to the federal criminal proceeding before it, the Court forcefully continued:

> "When [the trial court] grants the claim of privilege but allows it to be used against the accused to his prejudice, we cannot disregard the matter. *That procedure has such potentialities of oppressive use that we will not sanction its use* in the federal courts over which we have supervisory powers * * *." [13]

---

[11] 318 U. S. 189, 196 (1943).

[12] *Ibid.*

[13] *Id.* at page 199.

In *Stewart v. United States*,[14] Mr. Justice Black, speaking for the Court, has indicated in passing the constitutional basis of the federal statute upon which the federal "no comment" rule is based:

> "The Fifth Amendment * * * provides in unequivocal terms that no person may 'be compelled in any criminal case to be a witness against himself.' *To protect this right* Congress has declared that the failure of a defendant to testify in his own defense 'shall not create any presumption against him.' Ordinarily the effectuation of *this protection* is a relatively simple matter—*if the defendant chooses not to take the stand, no comment or argument about his failure to testify is permitted* * * *."

Within the past week at least two of the justices of this Court have broadly interpreted the self-incrimination clause of the Fifth Amendment to prohibit conduct by the trial court which, by utilizing the failure of the accused to testify in his own defense, "may jeopardize his chances of acquittal." [15]

The pertinent language of this Court in *Malloy v. Hogan* has already been referred to this Court's attention by petitioner.[16]

Nor may Respondent take great comfort from the fact that the federal "no comment" rule was originally based upon statutory, rather than constitutional authority in *Wilson v. United States*,[17] for the inferior courts in the

---

[14] 366 U. S. 1, 2 (1961).

[15] Mr. Justice Black, dissenting in *United States v. Gainey*, ____ U. S. ____, 33 U. S. L. Week, 4200, 4206 (March 1, 1965). And see Mr. Justice Douglas, dissenting in part in the same case at 4607: "* * * this rule against comment on the defendant's silence is mandated by the Fifth Amendment because 'using a defendant's silence as evidence against him is one way of having him testify against himself.'"

[16] Petition, page 7.

[17] 149 U. S. 60 (1893).

federal system, in ever-accelerating tempo, have found a constitutional basis for the "no comment" rule even in the presence of federal statutory authority. In *DeLuna v. United States*,[18] the Fifth Circuit Court of Appeals held:

> "In a criminal trial in a federal court an accused has a constitutionally guaranteed right of silence free from prejudicial comments * * *"

In *United States v. Ragland*,[19] the Fourth Circuit Court of Appeals said:

> "The protection against self-incrimination embodied in the Fifth Amendment to the Constitution is a fundamental right, which has been, and should be, jealously guarded by the courts. Not only is it universally held that a defendant in a criminal case may not be required to testify, but *it is equally well-recognized that he need not testify, [and] that the prosecuting attorney may not comment on his failure to testify * * *. These are fundamental rights which must not be frittered away.*"

And, since *Malloy v. Hogan, supra*, the Sixth Circuit Court of Appeals, in a federal habeas corpus proceeding, has applied the federal "no comment" rule as a constitutional requirement in a state criminal proceeding in Ohio.[20] The Court's pertinent language follows:

> "The right contained in the Fifth Amendment that the accused in a criminal trial in the federal court shall not be compelled to be a witness against himself includes both the right not to testify and *the right that such failure to testify shall not be subject of comment by the Attorney for the prosecution* * * *"[21]

---

[18] 308 F. 2d 140, 141 (5th Cir. 1962).

[19] 306 F. 2d 732, 736 (4th Cir. 1962).

[20] *United States v. Tehan*, 337 F. 2d 990 (6th Cir. 1964) petition for certiorari filed 2/4/65 *sub nom. Tehan v. Shott*, 33 U. S. L. Week 3275.

[21] *Id.* at 991.

> "* * * *the protection against self-incrimination under the Fifth Amendment includes not only the right to refuse to answer incriminating questions, but also the right that such refusal shall not be commented upon by counsel for the prosecution.*" [22]

It remains for this Court to give the Fifth Amendment in this context the "broad construction in favor of the right which it was intended to secure" [23] by holding that the "no comment" rule is a constitutionally required means of preserving the privilege against self-incrimination embodied in the Fifth Amendment applicable to the States through the Due Process clause of the Fourteenth,[24] for the reasons so well stated by Mr. Justice Murphy, dissenting in *Adamson v. California*;[25]

> "* * * the judge or prosecutor may comment on the failure of a defendant in a criminal trial to explain or deny any evidence or fact introduced against him * * *. [S]uch a provision compels a defendant to be a witness against himself in one of two ways:
>
> "1. If he does not take the stand his silence is used as a basis for drawing unfavorable inferences against him as to matters which he might reasonably be expected to explain. Thus he is compelled, through his silence, to testify against himself and silence can be as effective in this situation as oral statements.
>
> "2. If he does take the stand, thereby opening himself to cross-examination, so as to overcome the effects of the provision in question, he is necessarily

---

[22] *Id.* at 992.

[23] *Counselman v. Hitchcock*, 142 U. S. 547, 562 (1892). See also *Quinn v. United States*, 349 U. S. 155, 162 (1950) and *Ullmann v. United States*, 350 U. S. 422, 426 (1955).

[24] There is ample precedent for holding a procedural rule of criminal trial practice to be constitutionally required in order to enforce a broader substantive right. E.g. *Mapp v. Ohio*, 367 U. S. 643 (1961).

[25] 332 U. S. 46, 124-25 (1947).

compelled to testify against himself. In that case his testimony on cross-examination is the result of coercive pressure of the provision rather than his own volition * * *.

"This guarantee of freedom from self-incrimination is grounded on a deep respect for those who might prefer to remain silent before their accusers."

B.

The constitutional validity of the provision of the Ohio Constitution in issue here is not well settled at all.

Apparently in an attempt to urge that its validity is well settled, respondent has made much of the fact that Ohio courts have upheld the provision of the Ohio Constitution in issue here[26] and that this Court, in 1963, denied certiorari in *Shott v. Tehan*,[27] an Ohio case questioning the constitutionality of the same provision,[28] * * *. Quite apart from the lack of substantive significance to be accorded orders of this Court denying writs of certiorari,[29] the fact which appears to have escaped respondent is that all of the state cases cited in its brief were decided before this Court's landmark decision in *Malloy v. Hogan*,[30] applying the self-incrimination clause of the Fifth Amendment to the States, and that, as a consequence, until the case at bar, in which the Ohio Supreme Court, after *Malloy v. Hogan*, dismissed petitioner's appeal "for the reason that no substantial constitutional question" was presented to it, *the Ohio courts were never required to measure the*

---

[26] RB. 11.

[27] 373 U. S. 240, rehearing denied 374 U. S. 858 (1963).

[28] RB. 12.

[29] See opinion of Mr. Justice Frankfurter denying certiorari in *Maryland v. Baltimore Radio Show*, 338 U. S. 912, 917-20 (1950).

[30] 378 U. S. 1 (1964).

Ohio constitutional provision against the standards of the Fifth Amendment self-incrimination clause. A vivid illustration of the difference in result occasioned by the interposition of *Malloy v. Hogan* upon otherwise similar facts is available for examination.

Although respondent's brief describes in detail the refusal of this Court to review a conviction in which the Ohio constitutional provision was under attack *before Malloy v. Hogan*, in *Shott v. Tehan*,[31] it fails to report the subsequent history of the case. *After Malloy v. Hogan*, the Sixth Circuit Court of Appeals granted a federal habeas corpus application to that same defendant on the same facts.[32] Moreover, this Court has granted certiorari in *Griffin v. California*,[33] a California case which, under that state's constitution, raises the question upon facts not unrelated to those in the instant case[34] of the propriety of comment by counsel upon the silence of the accused. Perhaps this action may permit speculation that the Court has more

---

[31] 373 U. S. 240, rehearing denied 374 U. S. 858 (1963), mentioned at RB. 12.

[32] *United States v. Tehan*, 337 F. 2d 990 (6th Cir. 1964) petition for certiorari filed 2/4/65, *sub nom. Tehan v. Shott*, 33 U. S. L. Week 3275. See discussion of this case, *supra*, pp. 8-9.

[33] No. 202, October Term, 1964.

[34] Petitioner has distinguished the issues raised by the facts and counsel in *Griffin v. California* from those in the case at bar in a motion to consolidate both cases presently pending before this Court. For the Court's convenience, that motion to consolidate is appended to this reply brief. Since the motion to consolidate was filed, however, this Court has decided *United States v. Gainey*, No. 13, October Term, 1964, 33 U. S. L. Week 4200 (March 1, 1965) in which it held that a jury instruction which presumed the proof of an element of the offense charged, unless the defendant explained it away by other evidence, was not a comment on the failure of the accused to testify within the meaning of the federal "no comment rule." This holding points up the distinction between the language of the Constitutions of California and Ohio—a distinction, if the *Gainey* rule should be extended only slightly, with a constitutional difference.

than a passing interest in examining the Fifth Amendment implications of the "no comment" rule in state criminal proceedings in the wake of *Malloy v. Hogan*.

Petitioner contends that the respondent's still life view of the decided case authority has little value in determining the issues presented by this case; rather the cases should be examined "by considering their origin and the line of their growth." [35]

C.

A jury charge by the court that the state must establish the guilt of the accused by evidence beyond a reasonable doubt does not cure the constitutional defect.

Distinguishing the prosecutor's *argument* to the jury from *evidence* in the case, respondent apparently claims that any defect in the trial related to comment by counsel or consideration by court or jury of the failure of the accused to testify in his own defense was cured by the court's charge to the jury that "the prosecution must establish [the defendant's] guilt *by the evidence* beyond a reasonable doubt." [36]

To suppose that after the insinuating comment by the prosecutor, fortified by the court's charge to the jury that it might consider "the failure of the defendant to take the stand in his own behalf" along with "all the other * * * evidence in determining whether or not the defendant is guilty * * *," [37] the jury was able to distinguish between the evidence and argument in convicting the petitioner involves a flight of fancy to which petitioner cannot, and urges that this Court should not, subscribe. For the task assigned to this jury by the two confusing, if not conflict-

---

[35] *Gompers v. United States*, 233 U. S. 604, 610 (1915).

[36] RB. 11.

[37] R. 54-55, reported in full at P. 4-5.

ing, instructions of the court was "a mental gymnastic which is beyond, not only their power, but anybody's."[38]

Moreover, it should be pointed out that where unconstitutional procedure has tainted a hearing or trial, the test of reversal is whether there is a *reasonable possibility* that the unconstitutional procedure *might have contributed* to the result. See *Fahy v. Connecticut*, 375 U. S. 85 (1963).

D.

The prosecutor's comment and the court's charge to the jury were prejudicial to defendant even though, in the absence of such comment and instructions, the jury might have considered the failure of the accused to testify.

Respondent contends that, whether or not the prosecutor commented upon, and the court instructed the jury it could consider the defendant's failure to testify, the jury in any event would have considered the silence of the accused in the face of the charge against him as proof of his guilt, and that the behavior of the prosecutor and court in this respect was, consequently, constitutionally innocuous.

The constitutional difference between natural inferences which may be drawn from evidentiary facts and affirmative acts by state officials operating under color of legal authority designed to procure, and having the actual effect of procuring, the same inferences by a jury should

---

[38] Judge Learned Hand in *Nash v. United States*, 54 F. 2d 1006, 1007 (2d Cir. 1932). And see Mr. Justice Jackson's more general comment in *Krulewitch v. United States*, 336 U. S. 440 (1949):

"[T]he naive assumption that prejudicial effects can be overcome by instructions to the jury * * *, all practicing lawyers know to be unmitigated fiction."

require little comment. "Even if it were true that reasonable men cannot avoid drawing 'natural inferences from an accused's silence,' that is quite a different thing from having the silence emphasized by comment. The imputation of guilt from silence, if it does nothing else, may confuse the jury as to the presumption of innocence in favor of the accused." [39]

E.

Petitioner has properly preserved the issues for review and shown prejudice.

Finally, respondent contends that even if the Ohio Constitution and the Ohio statute which authorize the behavior of court and prosecutor from which petitioner here seeks relief are repugnant to the command of the Fifth Amendment, this Court ought not to so hold, because petitioner has neither properly preserved the issue for review nor shown prejudice resulting from the behavior of the court and prosecutor.

Without speculating as to the kind or strength of proof of causal relationship between the trial conduct in issue and the conviction necessary to demonstrate prejudice sufficient, according to respondent's standards, to compel reversal of the conviction, this Court has held that, where a constitutional question has been raised, no such causal relationship need be shown, even if the state in whose court the trial took place has a more stringent rule of prejudicial error. *Fahy v. Connecticut*, 375 U. S. 85 (1963). If there is a *reasonable possibility* that the unconstitutional procedure *might have contributed* to the result, this is a sufficient showing to permit this Court to review the case, no matter how harsh the state rule. Even

---

[39] *DeLuna v. United States*, 308 F. 2d 140, 152 (5th Cir. 1962).

by more strict standards than these, but certainly by these standards, the record amply demonstrates the required prejudicial effect to permit review here.

Moreover, quite apart from the fact that trial in the case at bar took place before this Court overruled *Adamson v. California*[40] and *Twining v. New Jersey*[41] in *Malloy v. Hogan*,[42] defense counsel in the trial below has properly preserved the issues for review by this Court.

Although it is true that for tactical reasons, the defense made no specific objection to the comment of the prosecution during argument, it is well settled under Ohio law that questions of misconduct of counsel in argument may be preserved even in the absence of contemporaneous objection by the aggrieved party. *Landesman v. Western Reserve University*, 132 Ohio St. 131 (1936); *Thatcher v. Penn, O & D Rd. Co.*, 33 Ohio App. 242, 246 (Lucas 1928); *Hayes v. Smith*, 62 Ohio St. 161 (1960).

So far as respondent's claim that no specific objection to the charge of the Court was made,[43] petitioner objected generally to the charge at the time of trial.[44] No more is required of counsel under Ohio law in order to preserve for review his contention that the jury charge was affirmatively erroneous. Section 2321.03, Ohio Revised Code; *Rosenberry v. Chumney*, 171 Ohio St. 48 (1960); *Simko v. Miller*, 133 Ohio St. 345 (1938).

Nor is petitioner aware of how respondent's argument is advanced by the recitation that defense counsel advised

---

[40] 332 U. S. 46 (1947).

[41] 211 U. S. 77 (1908).

[42] 378 U. S. 1 (1964). A circumstance which might evoke a more lenient determination of the question of whether the record preserves the issue for review.

[43] RB. 15.

[44] R. 58.

the jury upon *voir dire* and in opening statement as a technical matter that the accused had a previous criminal record.[45] If respondent's point is that the jury was voluntarily advised by defense counsel of the only fact apart from guilt which would justify an accused in refusing to testify, the principal premise of this *non-sequitur* is not supportable even in fact.

As this Court has pointed out in *Wilson v. United States*: [46]

> "It is not everyone who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not everyone, however honest, who would, therefore, willingly be placed on the witness stand."

* * * * *

The grant of review of this case, and reversal of the state court conviction below will strengthen the effectiveness of the self-incrimination clause of the Fifth Amendment, as applied to state criminal procedure by giving renewed meaning to the fundamental consideration expressed by Mr. Justice Black, concurring in *Grunewald v. United States*, 353 U. S. 391, 425 (1957):

> "[There are] no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it. The value of these constitutional privileges is largely destroyed if persons can be penalized for relying on them."

---

[45] RB. 15.

[46] 149 U. S. 60, 66 (1893).

CONCLUSION.

For the foregoing reasons, as well as for the reasons set forth in his petition for writ of certiorari, petitioner renews his prayer that the petition for writ of certiorari be granted.

Respectfully submitted,

BERNARD A. BERKMAN,
Counsel for Petitioner.

GEORGE S. ROEST,
Of Counsel.

In the Supreme Court of the United States

No. 789.
OCTOBER TERM, 1964.

RAYMOND D. HOWELL,
Petitioner,

v.

STATE OF OHIO,
Respondent.

APPLICATION TO CONSOLIDATE WITH ANOTHER PENDING CASE IN ADVANCE OF ARGUMENT OR, IN THE ALTERNATIVE, IN ADVANCE OF RE-ARGUMENT.

To the Honorable Potter Stewart,
Associate Justice of the United
States Supreme Court and Circuit
Justice for the Sixth Circuit:

The petitioner hereby respectfully applies for an order consolidating the within cause for argument with the case of *Griffin v. California*, No. 202, October Term, 1964, scheduled for oral argument during the week of March 8, 1965, or in the alternative, for an order consolidating the within cause with *Griffin v. California, supra*, for reargument at a time to be determined by this Court after the grant of certiorari in the within cause.

Petitioner believes that consolidation of his case with *Griffin* in such a manner that this Court may make disposition of both cases simultaneously on their merits will

permit a more orderly consideration of the general issue and a more effective and meaningful decision to be rendered on the principal issue raised in both cases:

> To what extent may an accused who fails or refuses to testify in his own defense in a state criminal proceeding be subjected to adverse comment during his trial for exercise of his constitutional right to remain silent as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution?

Petitioner contends that his case presents at least two facets of this issue which are different from that presented by *Griffin v. California;* that a decision of this Court based upon an analysis of the fact situations in both cases would provide greater clarity, and more guidance to state legislative and judicial bodies concerned with the administration of state criminal procedures in accordance with federal constitutional commands, than would an opinion based upon the *Griffin* facts alone; and that, as a consequence, this Court should, in some manner, consolidate both cases, hear consecutive arguments and render companion opinions.

There are two respects in which *Griffin v. California* and the instant case differ materially:

1. The Constitution of California, which permits the conduct of which petitioner in *Griffin* complains, provides, in pertinent part, as follows:

> "No person shall * * * be compelled, in any criminal case, to be a witness against himself; * * * but in any criminal case, *whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury.*" Article 1, Section 13, California Constitution (Emphasis supplied).

However, the Constitution of Ohio, which authorized the conduct from which petitioner in the instant case seeks the relief of this Court, provides, in pertinent part, as follows:

> "* * * No person shall be compelled, in any criminal case, to be a witness against himself, *but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel* * * *" Article I, Section 10, Ohio Constitution (Emphasis supplied).

Stated simply, the California Constitution permits comment upon the defendant's *refusal to meet evidence introduced against him by the state*, and, at least inferentially, suggests that such adverse comment would be limited to circumstances in which the accused, by his own testimony, could rebut the state's evidence.

The Ohio Constitution has no such limitations; it permits adverse comment by counsel and consideration by the court and jury of the mere *exercise* by the accused of his constitutional right to remain silent and off the witness stand, *whether or not the state has introduced any evidence against him which it is in his power to rebut.* If the California provision may be interpreted as a rule of evidence—a permissible inference to be drawn from unrebutted facts, and not a matter of infringement of constitutional rights,* the broad provision of the Ohio Constitution is not susceptible to such an interpretation, for its language permits an accused who does not testify to be castigated before the trier of fact for failure to state an

---

* See argument of respondent on this point in *Griffin v. California*, Respondent's Brief, 20-21 and petitioner's weak response, Petitioner's Answer Brief, 4.

affirmative fact as well as for failure to *deny* the state's *affirmative* evidence. **

2. The petitioner in *Griffin* seeks reversal of his conviction in this Court on the issue of self-incrimination solely because of the prosecutor's conduct on final argument. Petitioner's Brief, 10-12. In the instant case, petitioner seeks reversal of his conviction not only on that ground, but also on the further basis that the charge of the Court to the jury was itself in contravention of the Fifth and Fourteenth Amendments. Petition for Writ of Certiorari, 2, 4, 8. Counsel for petitioner in *Griffin* waived this point. Petitioner's Brief, 10-12. It seems evident that, if the prosecutor's comment as a zealous and obviously partisan advocate upon the exercise of the privilege by the accused is material in determining the fairness of his trial, the calm and deliberate charge to the jury by the Court, cloaked with all the majesty, authority and impartiality of the state, is vital to that determination.

* * * * *

Petitioner has attempted to demonstrate the additional factors in his case which justify the joinder of his cause with that of *Griffin v. California*, from the standpoint of the great social and moral decisions which it is this Court's function to make and in view of the broad supervisory role over state criminal proceedings this Court has assumed as a result of its interpretation of the due process clause of the Fourteenth Amendment.

** In the instant case, the prosecutor commented on the failure of the accused to take the stand and testify "where he had been gainfully employed at any time * * *" (R. 46a), an *affirmative fact* not part of the state's proof of the offense of procuring a female under 18 years of age for purposes of prostitution in violation of Section 2905.10 Ohio Revised Code, of which petitioner was convicted.

It is true that this Court granted certiorari in *Griffin* before the court of last resort in Ohio had finally ruled in the case at bar* and that, as a consequence, *Griffin* is farther along the road to adjudication than is the instant case.**

But this Court's procedure is flexible enough to permit it to fashion a means of so doing, if, upon analysis, it should deem the consolidation of these causes advisable and valuable to the performance of its substantive adjudicatory function. See *Jacobellis v. Ohio*, 378 U. S. 184 (1964).***

WHEREFORE, it is respectfully requested that an order issue from this Court consolidating the within cause with that of *Griffin v. California*, in such manner as this Court may devise, so that both cases may be adjudicated by this Court in the same decision or in consecutive order.

Respectfully submitted,

BERNARD A. BERKMAN,
Counsel for Petitioner.

---

* Petition for writ of certiorari in *Griffin v. California* was granted by this Court on June 22, 1964. The judgment of the Ohio Supreme Court from which petitioner seeks relief in the instant case was entered on September 23, 1964 and this case was docketed in this Court on December 28, 1964.

** *Griffin v. California* is scheduled for oral argument on the merits during the week of March 8, 1965. In the case at bar, petition for writ of certiorari and answer brief of respondent have been filed. This Court has not yet ruled on the petition.

*** In *Jacobellis v. Ohio* this Court heard argument initially on March 26, 1963 (31 U. S. L. Week 3318), but restored the case to the calendar on April 29, 1963 (31 U. S. L. Week 3353) upon granting certiorari in *Smith v. California* (31 U. S. L. Week 3353, April 29, 1963) in order to hear argument on the related issues in these two cases in sequence.

Certificate of Service.

A copy of the foregoing Application to Consolidate With Another Pending Case in Advance of Argument or, in the Alternative, in Advance of Re-argument was served upon Counsel for Respondent, Robert O. Stout, Prosecuting Attorney, Marion County, Ohio, 115 North Main Street, Marion, Ohio, by mailing to him a true copy of the application in an envelope duly addressed to him, bearing proper postage and deposited in the United States mail at Cleveland, Ohio, this 26th day of February, 1965.

BERNARD A. BERKMAN,
Counsel for Petitioner.